

George Joseph Orchard Siding, Inc. and International Brotherhood of Teamsters, AFL-CIO.
Case 19-CA-25003

January 9, 1998

ORDER DENYING APPEAL

BY CHAIRMAN GOULD AND MEMBERS FOX,
LIEBMAN, HURTGEN, AND BRAME

On October 29, 1997, Administrative Law Judge Clifford H. Anderson issued the attached order directing that the Agency supply and pay for an interpreter to interpret testimony given by non-English speaking witnesses called by the Respondent during the trial in the above proceeding.

Thereafter, on November 5, 1997, the General Counsel filed a request for special permission to appeal the administrative law judge's order pursuant to Section 102.26 of the Board's Rules and Regulations. The General Counsel contends that the judge's order is unsupported by any statutory authority and contrary to long-standing General Counsel policy, is unwarranted under the circumstances because the Respondent has not contended that it is financially incapable of paying for an interpreter, and would establish a harmful precedent which could result in a substantial expenditure of limited Agency funds.

Having duly considered the matter, we deny the General Counsel's request for special permission to appeal. In agreement with the judge, we find that administrative law judges have the discretionary authority under the National Labor Relations Act, the Administrative Procedure Act, and the Board's Rules and Regulations to appoint interpreters in unfair labor practice proceedings. Although such authority is not specifically set forth therein, we find that the power to appoint interpreters is inherent in the administrative law judge's duties and powers to regulate the course of the hearing.

In so finding, we reject the General Counsel's contention that the fact that courts but not the NLRB have been expressly granted the authority to appoint interpreters pursuant to the Federal Rules of Civil Procedure and the Court Interpreters Act means that NLRB administrative law judges lack the power to appoint interpreters. As indicated by the judge, the NLRB and its administrative law judges clearly have the inherent or implied power to appoint interpreters in unfair labor practice proceedings. See also 75 Am.Jur.2d, *Trial*, § 57 (1974) ("It is universally agreed that any court which has the power to take the testimony of witnesses in the customary manner has inherent power to appoint an interpreter for the purpose, and this power is not impaired or impliedly excluded by statutes providing for the appointment of official interpreters in certain courts, but omitting the court concerned.")

Further, we find that the General Counsel has failed to establish that the judge abused his discretion by ordering the Agency to provide an interpreter in this case. Initially, we reject the General Counsel's contention that the judge's order is an abuse of discretion because it is contrary to long-standing General Counsel policy. As indicated by the judge, it is not clear that the General Counsel's policy against paying for an interpreter for respondent witnesses has been applied uniformly.¹ Further, and more importantly, it is the Board, not the General Counsel, that must establish any policies related to providing interpreters. The Board has never adopted a policy on this issue.²

With respect to the General Counsel's contention that the judge's order was unwarranted under the particular circumstances of this case and could establish a harmful precedent, we share the concern expressed by the General Counsel and our dissenting colleagues about the possible budgetary impact of the judge's ruling if applied in future cases. However, the General Counsel has not set forth sufficient data to determine the extent of the potential financial burden on the Agency.

Finally, like the judge, we limit our ruling to the facts of this case. Although this case presents the Board with an opportunity to address the broader issue of the appropriate standards to be applied in future cases in determining whether the Agency should provide and pay for an interpreter for respondent witnesses, we are reluctant to set such standards on the limited record in this case and without input from the labor-management community, including employers, unions, and legal practitioners, and the public. Indeed, we believe this may be an issue that would more appropriately be addressed through rulemaking. Accordingly, we will defer setting such standards until we have received such additional information and input.

ORDER

The General Counsel's request for special permission to appeal is denied.

¹ In their appeal, counsel for the General Counsel assert "on information and belief" that the policy has been applied uniformly in the 50 states. However, they provide no supporting documentation. Further, we have been administratively advised that the policy is not followed in the Agency's Puerto Rico Regional Office, which routinely provides interpreters for all non-English speaking witnesses in unfair labor practice proceedings conducted in that Region, regardless of whether the respondent can afford to pay its own interpreter. Thus, it appears that, at least in Puerto Rico, the Agency is currently providing and paying for interpreters for respondent witnesses.

² The fact that there are as yet no definitive standards is no reason to reverse the judge's considered judgment that interpreters should be supplied in this case. As discussed above, we see no abuse of discretion.

MEMBERS FOX AND LIEBMAN, dissenting.

Contrary to our colleagues, we would grant the General Counsel's request for special permission to appeal and reverse the judge's order. In so holding, we note: (1) the absence of any specific Board precedent or authority for an order requiring the Agency to provide and pay for interpreting services for a respondent's witnesses; and (2) the lack of any clear standards for identifying cases that would warrant such an order. As indicated by the General Counsel, upholding the judge's order in these circumstances may set a harmful precedent and lead to similar orders in future cases, thereby imposing significant additional costs on the Agency and further straining the Agency's limited budgetary resources.

ORDER

STATEMENT OF THE CASE

The above-captioned case has been in litigation for 2 weeks, in Yaldma, Washington. The case is currently adjourned to resume on November 18, 1997. On October 23, 1997, at trial following the General Counsel resting his case in chief, a dispute arose respecting the obligation of the government to provide and pay for the services of an interpreter during the Respondent's presentation of its defense in chief. The Respondent sought the continued services of the interpreter used by the General Counsel during his presentation. The General Counsel, with the concurrence of the Charging Party, while not opposing the Respondent's retention of the interpreter's services, insisted that the expense incurred through such use of interpreter services be borne by the Respondent. I gave the parties until the close of business on Tuesday, October 28, 1997, to submit arguments in support of their positions, if desired, and indicated I would issue an order thereafter resolving the matter. On Monday, October 27, 1997, the General Counsel submitted a brief in the matter.

The instant case involves events and circumstances witnessed and participated in by numerous witnesses many of whom are not English speakers or whose English is sufficiently limited so that testimony in Spanish is necessary. The General Counsel's case in chief included numerous witnesses who testified in Spanish with the aid of an interpreter provided and compensated by the General Counsel. There is no doubt that the Respondent's defense has included to date, and may reasonably be anticipated to include in future, similar testimony requiring interpretation.

Arguments of the Parties

The Respondents argument is, in effect, that since an interpreter has been substantially utilized by the Government during its case and has been and will be necessary for the Respondent in its defense, interpretation is a necessary part of the entire trial and should therefore be supplied and paid for by the Board as part of the necessary adjudicative support provided in unfair labor practice litigation before the Agency. The General Counsel would characterize the use of an interpreter as a matter within the sole discretion of the party

using such services and that in consequence the cost of those services should be born by its user. The General Counsel also argues that the General Counsel has not historically paid for the use of interpretation for the witnesses of other parties and has no budgetary provision to assume such obligations. Further the General Counsel argues there is no legal or equitable basis for imposing such an obligation and opposes any provision of interpretive services to the Respondent in the instant case.

Analysis and Conclusions

Background: The Organization and Structure of the National Labor Relations Board

In order to fully appreciate the arguments made by the parties, it is necessary to understand the organizational structure of the Board. The National Labor Relations Act created a Board and a separate General Counsel. The Board under the Act is empowered to prevent unfair labor practices and to hear and decide unfair labor practices cases. The Act clearly separates the investigation and prosecution functions associated with unfair labor practices by specifically assigning final authority in investigative and procedural matters to the General Counsel under Section 3(d) of the Act. The Act further provides the General Counsel shall exercise general supervisory responsibilities over all regional Board staff. Through the years by written delegation of authority, the Board has assigned Agency administrative functions to the General Counsel. See, e.g., the Board's amending delegation reported at 24 F.R. 6666 (August 12, 1959). The General Counsel under the dual authorities of the Act and the Board's delegations maintains organizational units such as the Division of Operations Management (Board's Rule and Regulation Sec. 202.1.1) and Division of Administration (Board's Rule and Regulation Sec. 202.1.4) which in part function to implement Board policies and provide general, fiscal, administrative, and support services for the General Counsel and the Board.

The administrative law judge hearing unfair labor practice complaint cases under the Act does not have independent budgeted funds to utilize as necessary to obtain and provide necessary aspects of the litigation process. Rather, the consequence of the Board's organizational structure described above has been that the Board, administrative law judge trying an unfair labor practice complaint case relies on the General Counsel and his regional staff to provide and, where appropriate, pay for various matters necessary to the adjudication of the complaint. Thus, for example, hearing rooms for the holding of unfair labor practice complaint cases are provided and paid for by the General Counsel and, if an administrative law judge directs that a new hearing room be necessary, the General Counsel is obligated to obtain and pay for that new space in his role as the Agency's administrative and support representative as opposed to his separate and independent role as the prosecutor of the unfair labor practice.

There are of course various duties and obligations borne by parties to unfair labor practice litigation and specific duties and obligations born by the General Counsel as the prosecutor of such cases. These duties and obligations of a litigator or prosecutor are conceptually separate and apart from the duties of the General Counsel as the administrative and

budgeting arm of the Agency used by the trial administrative law judge to procure and obtain services necessary to carry out the administrative process in hearing and deciding unfair labor practice cases.

The Instant Issue Narrowed and Defined

The issue involved herein—whether or not the General Counsel should provide and pay for interpretation for the Respondent's witnesses—might at first blush be viewed as a question dealing with the obligation of a party litigant, i.e., the duty of the prosecutor of an unfair labor practice complaint or other party to the litigation by virtue of their role or action as trial participants. Thus, for example such an issue might arise where a party—be it the General Counsel, the Respondent, or the Charging Party—called a witness and provided necessary interpretation for the direct examination of that witness, but thereafter refused to provide or retain the interpreter for the cross-examination. In such a setting a judge might order the party to continue to provide the interpretation through the cross-examination of the witness as a consequence of the decision to call and offer the interpreted direct testimony.¹ The General Counsel as prosecutor has special duties and obligations such as the obligation to turn over witness affidavits under the circumstances defined in Section 102.118 of the Board's Rules and Regulations.

I do not find such a "litigator's burden" at issue herein. More specifically on the facts of this case, I do not believe the General Counsel is obligated by virtue of his role as a litigant or as a prosecutor to provide interpretation services to the Respondent's witnesses during the presentation of the Respondent's case as a result of his use of interpretation in the presentation of his case in chief. Such litigation conduct obligation issues might well arise in other settings, but I do not perceive the Respondent's request for interpretation herein to be based on such a theory. Further, were I to so perceive the Respondent's request as sounding in these terms, I would find such a request to be without merit on the facts of this case.²

Rather, I find that the question presented herein is essentially whether or not the judicial forum—as opposed to the prosecutor—is obligated to provide interpretation to all the parties³ in this case. That question has two parts: (1) does a judge have the authority to provide such services and (2) if so, is it appropriate in this case. If that two-part question is decided in the affirmative and I find it necessary for the judicial process to provide such interpretation services to the Respondent, then by virtue of the Board's structure and practice as described above, the General Counsel would normally be expected to provide and pay for those services acting in

the role of the administrative assistant to the Board and the administrative law judge and not as a result of his status as a litigant or as the prosecutor of the unfair labor practice complaint.

Does an Administrative Law Judge Hearing an Unfair Labor Practice Case Have the Authority to Provide Interpreter Services to Parties' Litigant?

The National Labor Relations Act, Administrative Procedure Act, 5 U.S.C. § 551–559, and the Board's Rules and Regulations at Sections 102.35, 102.43, etc., provide administrative law judges presiding over unfair labor practice trials with broad powers generally akin to those of trial judges in the state and Federal courts. The Board's Rules and Regulations at Section 102.35 provides, in its various subparagraphs, that it shall be the duty of an administrative law judge to inquire fully into the facts of an unfair labor practice case, to regulate the course of the hearing and to take other actions as necessary. The Rules do not specifically address questions of trial witness interpretation. Federal Rule of Civil Procedure 43(f) asserts:

INTERPRETERS. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

While it is true that the Federal Rules of Civil Procedure do not apply without exception to the Board's unfair labor practice hearings, I find that Rule 43(f) provides support for the proposition that the selection, appointment, and compensation of interpreters are matters within the control and discretion of the trial judge and, by extension, falls within the general trial authority of Board administrative law judges in the trial of unfair labor practice complaints.

Under Section 10(b) of the Act as well as the Board's Rules and Regulations Section 102.39, the Federal Rules of Evidence apply insofar as practicable to unfair labor proceedings under the Act. Under Federal Rules of Evidence Rule 604 an interpreter is subject to the rules of evidence pertaining to witness qualification as an expert. Federal Rules of Evidence Rule 706 provides generally for court appointed experts and, at Rule 706(b), provides for payment of experts under specific situations with provided funds and adds:

In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs

Thus, the Federal Rules of Evidence seemingly affords the same discretion to trial judges in the appointment and payment of interpreters as experts that Federal Rule of Civil Procedure 43(f) explicitly provides.⁴

Based on the cited rules and the Board's Rules and Regulations and decisional law respecting trial judge discretion generally, I specifically find and conclude that Board administrative law judges hearing unfair labor practice cases have

¹ Indeed such a situation might arise where the General Counsel called certain of the Respondent's agents and examined them under Fed.R.Evid. 611(c) through an interpreter. While certain agents of the Respondent were called as witnesses by the General Counsel in the instant case, the individuals involved did not utilize interpretation.

² This being so I shall not further consider or discuss the General Counsel's arguments that, as a prosecutor or party litigant, it should not be liable to provide the Respondent with interpretation services.

³ The fact that the issue arose after the General Counsel and the Charging Party had rested their cases in chief makes the provision of service to the Respondent's witnesses the sole practical issue involved.

⁴ Indeed, Congress in enacting the Court Interpreters Act, 28 U.S.C. § 1827, has made it clear that interpretation is a matter of importance within the Federal courts.

the authority in appropriate circumstances to provide and appoint interpreters for the witnesses of parties or to otherwise direct their payment by the parties. I further find that I have the authority, where appropriate, to provide paid interpretation to any and all parties. I find this authority devolves from the general and specific authority of an administrative law judge as the trier of unfair labor practice cases as well as the enabling language of the statutory and regulatory provisions cited, *supra*.

I make these findings and conclusions despite the opposing arguments of counsel for the General Counsel.⁵ The General Counsel argues at page 2 of its brief:

It has been the General Counsel's uniform policy since 1978 (GC Memo 78-45, attached as Appendix A), that the General Counsel "should not provide interpreters for witnesses called by the parties." This policy was reaffirmed in 1990, pursuant to GC Memo 90-81 (Appendix B). In the instant case, Region 19 has not received clearance from the General Counsel to ignore well established policy and make such payments.

In the first instance, the counsel for the General Counsel has taken liberty with the fair meaning of the cited memorandum. The General Counsel Memorandum 90-81, dated November 1, 1990, characterizes itself as a reissuance of the operative portions of an earlier General Counsel Memorandum, General Counsel Memorandum 78-45. The latter memo in effect asserts that the Regional Offices will, where required, secure and pay for interpreter services for all parties in representation case hearings. The memorandum further asserts:

With respect to "C" case [unfair labor practice] hearings, the Regions should continue to provide interpreter services for foreign language witnesses called by the General Counsel, but should not provide interpreters for witnesses called by the [other] parties *without clearance from their Assistant General Counsel*. [Emphasis added.]

Thus the memorandum by its terms simply instructs regional staff on the procedural handling of the interpreter issue and does not support counsel for the General Counsel's argument that the General Counsel uniformly or without exception opposes provision of government paid interpreters to other parties.

Secondly, the General Counsel's memoranda, or indeed other communications or positions of the General Counsel, like the positions of the counsel for the General Counsel made at trial, are but the position of a party to the complaint litigation. As such the General Counsel's positions—as opposed to joint General Counsel-Board determinations or provisions—are not binding on the Board or its judges and are

effective only to the extent they are persuasive.⁶ I do not find that the cited memoranda support a finding that administrative law judges are without authority in the matter.

Should the National Labor Relations Board be Required
on the Facts of this Case to Provide and Pay for the
Respondent's Use of an Interpreter During the
Presentation of the Respondent's Witnesses?

Having determined I have the discretion to provide and pay for the interpretation of respondents' witnesses in appropriate cases where the provision of such services ought to be provided by the judicial forum, it remains to be determined whether or not it is appropriate to do so in the instant case.

In a Board unfair labor practice proceeding, as in most American adversary litigation, certain matters are typically the province and responsibility of the parties to the litigation and other areas are the province and responsibility of the judicial officers. Thus, the judge, the court reporter, the physical arrangements of the courtroom, and associated areas are all provided by the judicial forum which is often a separate unit of Government. In noncriminal matters, including the trial of an unfair labor practice case under the Act, the parties to the litigation are responsible for and typically pay for the marshalling and presentation of their own advocacy, evidence, and associated matters. Congress has taken special measures to ensure that the office of the General Counsel and that of the Board and its division of judges are well separated respecting the prosecution and deciding of unfair labor practice cases. Metaphorically the roles of referee and player in the contest are separate and distinct.

Interpretation is not so clearly and consistently associated with either judicial or partisan roles. Under the cited provisions of the Federal Rules of Evidence and Civil Procedure, parties typically supply, qualify, and pay their own interpreters and those interpreters and their efforts may be challenged by opposing parties as any other expert witness may be. Yet, interpretation has another aspect. It is of its nature seemingly neutral in its effect on evidence and is in many ways akin to the process of court reporting where the testimony of witnesses is simply taken down and preserved. The middle ground status of interpretation is further illuminated by the simple comparison of the roles of court participants. A court reporter takes no trial-by-trial public oath to report accurately, that obligation flowing from the position held. Witnesses are publicly sworn to tell the truth. Interpreters take an oath unique to their profession to interpret the testimony of all witnesses to the best of their skill, knowledge, and ability. There is clearly a bit of both witness and reporter in the role of the interpreter.

Further the role of interpretation, as a judicial as opposed to a partisan function, seems to me to depend on the nature and extent of the interpretation involved in a particular trial. Compare two trials; one in which numerous, if not all, witnesses are testifying through interpretation and essentially all events in contest occurred among individuals who speak primarily in a foreign language. Consider another trial in which only a single witness on the Respondent's side requires interpretation and the matters in contest occurred essentially en-

⁵The General Counsel predicates certain arguments on findings and conclusions set forth in an unpublished disposition of the Ninth Circuit Court of Appeals in *Yaohan U.S.A. Corp. v. NLRB*, 121 F.3d 720 (1997) (Referenced in Table of Decisions Without Reported Decisions). Such decisions are not precedential and should not be cited for propositions of law beyond the case in question. I have therefore disregarded the arguments made respecting that case.

⁶To extent the General Counsel argues that payments are not budgeted or authorized for interpreters, this argument is discussed, *infra*.

tirely among English speakers speaking in English. In the former situation, interpretation is such a necessary part of the trial process it becomes in my view an inseparable part of the administrative process of the trial, i.e., more a judicial than an advocacy process. In the latter circumstance, where interpretation applies to the testimony of a single witness in a matter essentially free from interpretative requirements, interpretation is in my view much more a matter of the provision of expert testimony by one party to the litigation.

Put another way, I find that there is a level or degree of interpretation—by the percentage of evidence necessarily interpreted and by the number of witnesses involved—which in essence converts the interpretative process from one involving the simple partisan advocacy of a party to one where the interpretation is such a large part of the process as to become a part of the judicial rather than advocacy or adversarial elements of the trial. A case involving a high proportion of events and, in consequence, evidence, and testimony, occurring in languages other than English inevitably requires translation of essentially the entire judicial proceeding. I find such circumstances require as a matter of fairness and open judicial process that interpretation be provided as part of the judicial infrastructure—paid by the Government—rather than provided in the form of expert testimony offered and paid for by the respective contending parties. Using the degree and extent of involvement of the interpretive process in the trial as a basis for determining the obligation of the judicial forum to supply interpretation services, I turn to the instant case.

The complaint in the instant case essentially deals with the Respondent's failure to retain the services of some 15 employees employed in apple processing. The majority of the General Counsel's score or so witnesses were native Spanish speakers testifying through interpretation. The bulk of the testimony was in Spanish. The events relevant to the trial were largely conducted in Spanish. Affidavits, company letters, and other exhibits were often either in Spanish or in both Spanish and English. The Respondent's witnesses may fairly be expected to testify with interpretation in like proportion to the General Counsel's witnesses. I would characterize the instant trial as one conducted as much in Spanish as in English. This is so measuring by the number of witnesses, by the substance of the testimony, and by time involved. The community of individuals involved in or interested in the proceeding is in large part only Spanish speaking.

In such a setting, I find the trial involves such a degree, extent, or proportion of interpretation that the interpretive function transcends simply the advocacy of one party or another and rather becomes a necessary part of the judicial administration of the trial. As such the obligation to provide interpretation to all parties is a judicial obligation much as is the obligation to provide a court reporter and a court room for the trial. I do not find that the provision of interpretation herein is a prosecutor's obligation. As noted, *supra*, however, judicially required services in some cases under the Agency's financial and organizational structure, must be provided and paid for by the General Counsel at the trial judge's direction. I find this is such a case. Accordingly, I shall direct that pro-

vision be made by the General Counsel for the interpretation of the Respondent's witnesses testimony at trial.⁷

Having Found it is Necessary and Appropriate to Provide and Pay for the Interpretation of the Respondent's Witnesses, is There any Impediment to Directing the General Counsel, as the Administrative Arm of the Board in this Circumstance, to take the Necessary Action?

As noted, *supra*, the General Counsel and his organizational subdivisions provide general, fiscal, administrative, and support services for the Board and the administrative law judges. Having found that it is necessary and proper to provide the Respondent herein with interpreter services, it would normally be appropriate to direct the General Counsel acting in that support role to the administrative law judge to supply and pay for those services.

The General Counsel, however, argues on brief at 4:

There is no dispute that the National Labor Relations Act does not contain any such provisions [for authorization of funds for payment of Interpreters], nor has Congress specifically provided any other appropriated funds for payment of Interpreters used by parties in NLRB actions.

To the extent the General Counsel argues, in effect, fiscal inability, I do not intend to address budgetary aspects of the Agency's operations. I expect that the general appropriations used by the Agency to fund unfair labor practice litigation, howsoever organized, will be sufficient to compensate the interpreters whose services will be used and paid for under the order issuing below. Indeed, the counsel for the General Counsel argues on brief that no funds are available for "NLRB actions," yet, the General Counsel Memoranda, cited *supra*, note that interpretation in representation cases has historically been and will continue to be provided all parties at government expense.

My finding that it is necessary and proper to supply interpretation for the Respondent's witnesses, however, is not one which is based upon the Agency's ability to pay for the services.⁸ I make the finding because I find that it would be unfair and improper not to provide the services. Given such a finding, the presence or absence of funds does not change the conclusion on which the finding is predicated—the element of unfairness should interpretation be denied. Given such a finding, if the interpretation could not be supplied, the litigation could not fairly proceed and further motions would of necessity be considered.

A Clarification Respecting the Respondent's use of Interpreters

A minor issue arose when the General Counsel objected to the Respondent's use of the interpreter to prepare wit-

⁷ The interpreter used by parties heretofore has been retained for the remainder of the trial. The dispute involved herein was at all times limited to the issue of who would pay for his services.

⁸ The General Counsel points out that certain aspects of judicial utilization of the Court Interpreter's Act, cited *supra*, were statutorily conditioned on the availability of appropriated funds.

nesses out of court prior to their testimony. The Board in *Baker of Paris*, 288 NLRB 991 (1988), enfd. 929 F.2d 1427 (9th Cir. 1990), sustained a judge who allowed translation of testimony by interpreters who had been involved in the preparation of witnesses prior to trial. The Board, with court acceptance of the doctrine, held that such an out of court role did not per se require the disqualification of the interpreter. This being so I find no reason to prohibit the Respondent's use of an interpreter in such a manner.⁹ The obligation of the

⁹The Ninth Circuit Court of Appeals in *NLRB v. Baker of Paris*, 929 F.2d 1440, 1427 (1990), suggested in dicta that an interpreter provided at government expense may have a higher standard. The Board may well wish in the future to restrict the use of judicially provided interpreters, i.e., interpreters who are government paid and provided to all sides, to court room interpretation only. Given the

General Counsel to provide interpretation services to the Respondent herein, however, does not include the obligation to provide and pay for out of court or witness interview and/or preparation interpretation.

Given all the above, I issue the following

ORDER¹⁰

The Respondent is entitled to the use of a government supplied and paid for interpreter for the interpretation of witness testimony at and during the trial herein. Such services shall be provided and paid for by the General Counsel.

Board's decision in *Baker*, however, I do not find that I may properly limit the parties' use of the interpreter.

¹⁰Requests for special permission to appeal from ruling of an administrative law judge on a motion during trial are governed by the Board's Rules and Regulations Sec. 102.26.